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मध्यप्रदेश राजपत्र

(असाधारण)

प्राधिकार से प्रकाशित

क्रमांक 395]

भोपाल, गुरुवार, दिनांक 27 जुलाई 2017—श्रावण 5, शक 1939

संसदीय कार्य विभाग
(विन्ध्याचल भवन, बी विंग, द्वितीय तल)

Raj Bhavan, Bhopal the 1st July 2017

ORDER

1. WHEREAS, Shri Ramlal Kol, Vill. Hirwara, Post Hirapur Kodiya, Tehsil Mudwara, Dist. Katni and Shri Banshilal Dhanwal, Divisional President, M. P. AJAKS, Seminary Road, Ashta, Dist. Sehore, have submitted separate petitions dated Nil and 07th February 2017 respectively, for alleged disqualification of Shri Moti Kashyap, member of the State Legislative Assembly under clause (1) of Article 191 read with Article 192(1-2) of the Constitution of India.

2. WHEREAS, averment has been made in the said petitions that Shri Moti Kashyap was elected to the State Legislative Assembly on the basis of Scheduled Tribe Certificate, which was later found to be fake by the Madhya Pradesh High Court vide its Judgement dated 10-04-2013, thus attracting disqualification from his membership.

3. AND, WHEREAS, in pursuance of clause (2) of Article 192 of the Constitution of India, the opinion of the Election Commission of India has been sought regarding the alleged disqualification of Shri Moti Kashyap for being Member of the Legislative Assembly.

4. WHEREAS, the Election Commission of India has submitted its opinion dtd. 16th May 2017 vide letter dated 1st May 2017 (Annex-I).

5. The Election Commission of India opined that—

“8. It is settled through a catena of judgments of the Supreme Court that the jurisdiction of the Governor under Article 192(1) of the Constitution of India arises only in cases of post-election disqualification and referred to in Article 191 of the Constitution. The jurisdiction of the Commission to enquire

into such questions of alleged disqualification, on being referred to it by the Governor under Article 192(2) of the Constitution, also arises only in cases of post-election disqualification. Any question of lack of qualification does not come within the jurisdiction of the Governor and Election Commission under Article 192. Further, any question of pre-election disqualification, that is, qualification from which a person was suffering at the time of, or prior to his election, or lack of qualification to contest election can be raised by means of an election petition presented in accordance with the provisions of Article 329 (b) of the Constitution read with Part VI of the Act of 1951, and not under Article 192(1) of the Constitution. Reference is invited, in this connection, to the Supreme Court's decision *Election Commission v. Saka Venkata Rao* (AIR 1953 SC 201), *Brundaban Nayak v. Election Commission* (AIR 1965 SC 1892), and *Election Commission v. N. G. Ranga* (AIR 1978 SC 1609).

9. In view of the well settled Constitutional position referred to above, the question of alleged lack of qualification of the Respondent to contest the election cannot be raised before the Governor under Article 192(1) of the Constitution. The Election Commission also has no jurisdiction to express any opinion on the question of such alleged lack of qualification. The present petition is, therefore, not maintainable before the Governor in terms of Article 191(1) of the Constitution.

12. Accordingly, the reference from the Governor of Madhya Pradesh, is returned to the Governor of Madhya Pradesh with the opinion of the Election Commission of India under Article 192 (2) of the Constitution of India, to the above effect that the said petitions of Shri Banshilal Dhanwal and Shri Ramlal Kol are not maintainable under Article 192(1) of the Constitution.”

6. AND, WHEREAS, having carefully considered the facts on record as contained in the opinion of Election Commission of India and having been fully satisfied therewith.

7. NOW, THEREFORE, I, Om Prakash Kohli, Governor of Madhya Pradesh in exercise of the powers conferred on me under clause (1) of Article 192 of the Constitution, do hereby decide that the petitions dated Nil and 07th February 2017 respectively, filed by the Petitioners against Shri Moti Kashyap, MLA, Barwara, district Katni, are not maintainable under Article 192(1) of the Constitution of India.

Sd./-
(OM PRAKASH KOHLI)
Governor,
Madhya Pradesh.

भारत निर्वाचन आयोग

निर्वाचन सदन, अशोक रोड, नई दिल्ली—110 001

ELECTION COMMISSION OF INDIA

Nirvachan Sadan, Ashoka Road, New Delhi—110 001

REFERENCE CASE NO. 2 (G) OF 2017

[Reference from the Governor of Madhya Pradesh under Article 192 (2) of the Constitution of India]

In re : Reference Case No. 2(G) of 2017—Reference received from the Governor of Madhya Pradesh under Article 192 (2) of the Constitution of India seeking opinion of the Election Commission on the question of alleged disqualification of Shri Moti Kashyap, Member of the Legislative Assembly of Madhya Pradesh, under Article 191 (1) of the Constitution of India

OPINION

This is a reference, dated 16th March 2017, received from the Governor of Madhya Pradesh seeking opinion of the Election Commission of India under Article 192(2) of the Constitution of India, on the question whether Shri Moti Kashyap, a Member of the Legislative Assembly of Madhya Pradesh, elected from No. 91 Barwara, Katni assembly constituency, has become subject to disqualification, for being member of that Assembly, under Article 191 (1) of the Constitution of India.

2. In the said reference, the question of disqualification arose because of two petitions, one dated 07th February 2017, filed by Shri Banshilal Dhanwal and another filed by Shri Ramlal Kol (hereinafter, the "Petitioners") before the Governor of Madhya Pradesh, whereby the Petitioners have sought disqualification of Shri Moti Kashyap (hereinafter the "Respondent") under Article 191(1) of the Constitution of India on the ground of being election from No. 91 Barwara, Katni assembly constituency, reserved for the Scheduled Tribes, by furnishing a false caste certificate.

3. The Respondent was elected to the Madhya Pradesh Legislative Assembly from No. 91 Barwara, Katni Assembly Constituency in 2008. The said constituency is reserved for a person belonging to a Scheduled Tribe. The Petitioners have alleged that the Respondent got elected from a Scheduled Tribe Reserved Assembly Constituency by producing a fake caste certificate and, therefore, he is liable to be disqualified. The Petitioners have relied on the judgment, dated 10th April 2013, of the High Court of Madhya Pradesh in the case of Ramlal Kol v. Moti Kashyap @ Mitilal (Election Petition No. 20 of 2009), wherein it was held that the Respondent belongs to Other Backward Class and not a Scheduled Tribe and that the caste certificate submitted by him in support of his nomination paper was a forged document. Thus, the contention of the Petitioners is that the Respondent not being a member of a Scheduled Tribe, is disqualified for being Member of the Legislative Assembly from aforesaid reserved constituency, under Section 5(a) of the Representation of the People Act, 1951 (hereinafter, "Act of 1951"), which provides that a person shall not be 'qualified' to be chosen to fill a seat in the Legislative Assembly reserved for the Scheduled Tribes of that State, unless he belongs to any of those tribes. The Petitioners have sought disqualification of the Respondent under Article 191 (1) (e) of the Constitution of India.

4. The preliminary question which arises for consideration of the Commission on the present reference from the Governor is whether the present petitions, seeking disqualification of the Respondent from the membership of the Legislative Assembly of Madhya Pradesh, on the grounds mentioned therein, is maintainable in terms of Article 192(1) of the Constitution of India.

5. From the averments in the petitions, it is observed that the allegation of the Petitioners is that the Respondent obtained false certificate that he belongs to a Scheduled Tribe and contested election to the Legislative Assembly of Madhya Pradesh on the basis of such certificate from a constituency which is reserved for Scheduled Tribes. The Petitioners have placed reliance on the judgment, dated 10th April, 2013, of the High Court of Madhya Pradesh in the case of Ramlal Kol v. Moti Kashyap @ Motilal (Election Petition No. 20 of 2009), wherein it was held that the Respondent belongs to Other Backward Class and not a Scheduled Tribe and that the caste certificate submitted by him in support of his nomination paper was a forged document. It may be mentioned

here that the Supreme Court vide its order, dated 04th May 2016, in *Moti Kashyap@Motilal v. Ramlal Kol and Another* (Civil Appeal No. 4701 of 2013) held that the appeal from the High Court's judgment, dated 10th April 2013, has become infructuous. Thus, the allegation of the Petitioners is that the Respondent was not qualified under Section 5 (a) of the Act of 1951 to contest the election to the Legislative Assembly from the constituency reserved for the Scheduled Tribes.

6. It is well recognised that 'qualification' and 'disqualification' are two different concepts under the Constitution of India. The Constitution has prescribed certain qualifications under Article 173 and disqualifications under Article 191 separately for membership of State Legislatures. It has also been held in *Shyamdeo Pd Singh v. Nawal Kishore Yadav* (AIR 2000 SC 3000) that 'lack of qualification' does not amount to 'disqualification'.

7. A perusal of the provisions of Article 192 would show that only a question of disqualification under Article 191 can be raised before the Governor, and not the question of qualification or lack of qualification under Article 173. Article 192 reads as under:

"192. Decision on questions as to disqualifications of members—

- (1) If any question arises as to whether a member of a House of the Legislature of a State has become subject to any of the disqualifications mentioned in clause (1) of Article 191, the question shall be referred for the decision of the Governor and his decision shall be final.
- (2) Before giving any decision on any such question, the Governor shall obtain the opinion of the Election Commission and shall act according to such opinion."

8. It is settled through a catena of judgments of the Supreme Court that the jurisdiction of the Governor under Article 192(1) of the Constitution of India arises only in cases of post-election disqualification and referred to in Article 191 of the Constitution. The jurisdiction of the Commission to enquire into such questions of alleged disqualification, on being referred to it by the Governor under Article 192(2) of the Constitution, also arises only in cases of post-election disqualification. Any question of lack of qualification does not come within the jurisdiction of the Governor and Election Commission under Article 192. Further, any question of pre-election disqualification, that is, disqualification from which a person was suffering at the time of, or prior to his election, or lack of qualification to contest election can be raised by means of an election petition presented in accordance with the provisions of Article 329(b) of the Constitution read with Part VI of the Act of 1951, and not under Article 192(1) of the Constitution. Reference is invited, in this connection, to the Supreme Court's decisions in *Election Commission v. Saka Venkata Rao* (AIR 1953 SC 201), *Brundaban Nayak v. Election Commission* (AIR 1965 SC 1892), and *Election Commission v. N. G. Ranga* (AIR 1978 SC 1609).

9. In view of the well settled constitutional position, referred to above, the question of alleged lack of qualification of the Respondent to contest the election cannot be raised before the Governor under Article 192(1) of the Constitution. The Election Commission also has no jurisdiction to express any opinion on the question of such alleged lack of qualification. The present petition is, therefore, not maintainable before the Governor in terms of Article 192(1) of the Constitution.

10. Before parting with the matter, the Election Commission would like to point out that the present case again brings out the serious lacuna in the law in that Article 192 which deals with the question of post-election disqualification does not deal with cases of a member losing qualification after election as in the present case. This poses a serious challenge as it has the potential of perpetuation of an illegality, in the absence of a challenge by a vigilant citizenry in the High Court by way of an election petition. The election petition must be filed within 45 days and there is no statutory provision for condonation of delay for whatever reason (*Kishor Lal v. Sri Parimal Nathwani*, *Sri R. K. Anand and Sri Jay Prakash Narayan Singh*, AIR 2011 Jhar 147; *Hukumdev Narain Yadav v. Lalit Narayan Mishra*, AIR 1974 SC 480). Thus, there is no express provision either in the Constitution or in statutory laws prescribing forum before which the question of pre-election disqualification, which continues even after the election or lack of qualification at the time of election or the subsequent loss of qualification by an elected candidate may be raised and decided, where no election petition is filed within 45 days after the declaration of result for any reason. This lacuna in the law allows individuals to play fraud with the electoral process and undermines the

sanctity of the election system. Earlier also, the Commission recognizing this gap in law, has referred the issue to the Ministry of law & Justice, vide letter, dated 08th July 2016, to address this question through appropriate legislation.

11. The Commission would also like to stress upon the State Government that all aspects pertaining to issuance of caste certificate by the state authorities concerned should be thoroughly streamlined so that unscrupulous persons are not in a position to obtain fraudulent caste certificates, thereby depriving the rightful persons of availing their constitutional rights. The criminal prosecution of all concerned including the beneficiary and the officers involved should be extensively examined. It is of utmost concern to the Commission that such instances are not allowed to recur leading to the present unfortunate situation.

12. The reference from the Governor of Madhya Pradesh is, accordingly, returned to the Governor of Madhya Pradesh with the opinion of the Election Commission of India, under Article 192(2) of the Constitution of India, to the above effect that the said petitions of Shri Banshilal Dhanwal and Shri Ramlal Kol are not maintainable under Article 192(1) of the Constitution.

Sd./
(Shri O. P. Rawat)
Election Commissioner

Sd./
(Dr. Nasim Zaidi)
Chief Election Commissioner

Sd./
(Shri A. K. Joti)
Election Commissioner

Place : New Delhi
Date 16th May, 2017

महेन्द्र सोनूने, उपसचिव.